SUPREME COURT, U. S.

FILED

JUL 29 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 290.

BERNARD B. SPINDEL,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 1967 Mass. Adv. Sh. 199 and 223 N.E. 2d 511, and is set forth in Appendix A of the petitioner's Petition for Writ of Certiorari.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under 28 U.S. Code § 1257 (3).

Questions Presented.

Whether the language of Mass. G.L. c. 272, § 99 and § 101, as applied to the petitioner, meets the standards of

clarity and definiteness required by the due-process clause of the Fourteenth Amendment to the United States Constitution.

Constitutional Provisions and Statutes Involved.

The case involves the due-process clause of the Fourteenth Amendment of the United States Constitution. It also involves Mass. G.L. c. 272, §§ 99-101, as amended, and c. 278, § 20; these statutes are quoted in Appendix D of the petitioner's Petition for Writ of Certiorari.

Statement of the Case.

In 1962 Alamac Knitting Mills, Incorporated (Alamac), was engaged in the manufacture of textiles in Springfield. Alamac, employing some 800 people, occupied a large mill under a lease of the entire premises from the owner. Earlier in 1962 it was suspected that employees were pilfering finished materials, and William Thal, Alamac's chief executive officer, sought to ascertain the persons involved and how they operated. He communicated with his security officer (an independent contractor), and it was decided to tap telephones in the mill. At a meeting arranged between Thal and Spindel to carry out this decision, Thal authorized Spindel to place a wire tap on four telephones located in different parts of the mill. Thal also authorized Spindel to place in a desk exclusively used by Thal one or two wire or tape recorders so that conversations on the tapped phones could be recorded and monitored. Spindel completed the wiring and installation of equipment necessary for the telephone monitoring. Thereafter Thal recorded and monitored conversations emanating from the

tapped telephones. The four telephones involved were owned, installed and serviced by the New England Telephone Company and were used by various employees for outside calls as well as intraplant communication. Evidence was presented that employees involved did not consent to the monitoring of their telephone conversations. There was no evidence that any employee consented to such monitoring.

The jury were instructed that the word "device" appearing in the last clause of G.L. c. 272, § 101, as amended through St. 1956, c. 48, § 4, "referred to an electronic recording device, or a wireless tap or a similar device not involving tapping of a wire to intercept telephone communications" and that this clause did not apply to the tapping of a telephone wire. "The jury . . . [were] further instructed that proof of the tapping of any wire shall be prima facie evidence of the crime of eavesdropping, (1) unless duly authorized by a court order issued in accordance with section 99 and (2) unless done with the consent of the owner or person in control of the building." The jury found Spindel guilty of the crime of eavesdropping. Mass. G.L. c. 272, §§ 99-101, as amended.

The judge, at the *request of the defendant* (Petr.'s Appendix C, p. A13), reported the case to the Supreme Judicial Court of Massachusetts.

The questions reported were: "(1) Is it lawful to tap a wire to intercept telephone communications in a building when authorized by and done with the consent of the owner or persons in control of the building but without a court order issued in accordance with G.L. c. 272, § 99? (2) Does the language of G.L. c. 272, § 101, meet the standard of clarity and definiteness as the defendant in this case to satisfy the requirements of *Commonwealth* v. *Slome,* 321 Mass. 713 (1957)?"

The Supreme Judicial Court affirmed the judgment.

Argument.

1. The Supreme Court of the United States does not have jurisdiction to hear a case in which the alleged federal issue involved was not raised or decided in the State Court.

The petitioner invokes the jurisdiction of the Supreme Court to hear this case under 28 U.S. Code, § 1257 (3). However, it is well settled that, where the State Supreme Court did not pass on the question now urged, and where it does not appear to have been properly presented to that Court for decision, the Supreme Court is without jurisdiction to consider it in the first instance. *Congress of Industrial Organizations* v. *McAdory,* 325 U.S. 472, 477 (1945). See also *Shelley* v. *Kraemer,* 334 U.S. 1, 8-9 (1948); *Walters* v. *City of St. Louis,* 347 U.S. 231, 233 (1954); *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430, 433 (1940); and *Wilson* v. *Cook,* 327 U.S. 474, 482 (1946).

Moreover, defendant's counsel in a lobby conference with counsel for the Commonwealth and the Superior Court Justice hearing the case agreed to waive all assignments of error and other questions of law if the justice would report the case to the Supreme Judicial Court.

2. The language of Mass. G.L. c. 272, §§ 99-101, as applied to petitioner meets the standards of clarity and definiteness required by the due-process clause of the Fourteenth Amendment to the United States Constitution.

The Massachusetts Supreme Judicial Court has held that the statute is sufficiently definite in specifying the conduct that is inhibited so that a man of ordinary intelligence could ascertain whether any act of his will come within the

sweep of the statute, and that it was not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Commonwealth* v. *Spindel,* 1967 Mass. Adv. Sh. 199, at p. 203.

It is submitted that the construction given a statute by the State Court is conclusive of its scope and meaning. *Poulos* v. *New Hampshire,* 345 U.S. 395. *Fox* v. *Washington,* 236 U.S. 273.

3. Scienter is not in issue. Criminal scienter or intent is not in issue because the statute is *malum prohibitum* and not *malum in se.* Furthermore, it has long been held that ignorance of the law is no excuse. 1 Coke 177.

4. Petitioner here seeks to engage in such private conduct as is already forbidden to the states (*Berger* v. *New York,* U.S. S. Ct. October Term, 1966), and seeks to make constitutional acts which "constitute a great danger to the privacy of the individual;" thereby raising "grave constitutional questions under the Fourth and Fifth Amendment." Warren, C.J. in *Lopez* v. *United States,* 373 U.S. 427, at 441 (1963).

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari and motion for enlargement of the record should be denied.

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